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No. 87-373

IN THE

Supreme Court of the United States

October Term, 1987

TRANSAMERICA AIRLINES, INC.,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The complaint filed by Respondent Air Line Pilots Association, International ("ALPA") in this dispute alleges that Petitioner Transamerica Airlines, Inc. ("Transamerica") violated the bargaining, status quo and recognitional requirements of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, by (1) refusing to bargain in good faith with ALPA and (2) creating a nonunion, replacement subsidiary during contract negotiations to obtain work historically and actually performed by Transamerica. ALPA seeks the settled judicial remedy for these alleged RLA violations, namely an order requiring Transamerica to bargain in good faith and to restore the status quo working conditions of Transamerica's pilots through injunctive relief and back pay. Transamerica does not dispute that the complaint states claims for relief under the RLA; instead, the narrow issue presented for review is whether federal courts

maintain subject matter jurisdiction to adjudicate those claims.

The United States Court of Appeals for the Ninth Circuit held that the complaint, when construed in the light most favorable to ALPA, squarely alleged an RLA dispute within the jurisdiction of the federal courts. In doing so, the court of appeals rejected Transamerica's attempt to recast ALPA's replacement subsidiary claim as a "representation dispute" committed to the National Mediation Board ("NMB") and carefully distinguished ALPA's complaint from cases raising representation disputes under the RLA. The court of appeals further held that Congress did not create any "exception" to judicial enforcement of the RLA's good faith bargaining duty during the collective bargaining process itself. Because the court of appeals' decision correctly applies the settled judicial interpretation of the RLA and is fully consistent with other federal appellate decisions, Transamerica's petition presents no issue which warrants review by this Court.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 817 F.2d 510 (9th Cir. 1987). The June 5, 1985 oral decision of the district court (Pet. App. A16-A23) is unreported; the August 6, 1985 written decision of the district court is reported at 615 F.Supp. 371 (N.D. Cal. 1985).

JURISDICTION

The court of appeals entered its judgment on May 14, 1987 (Pet. App. A1) and denied Transamerica's petition for rehearing and suggestion for rehearing *en banc* on August 12, 1987 (Pet. App. A15). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The case concerns the proper interpretation of the RLA's bargaining, status quo and recognitional provisions, 45 U.S.C. §§ 152, First, 152, Third, 152, Fourth, 152, Ninth, 155, First, 156. Certain of these provisions are reproduced as Appendix E to the Petition (Pet. App. A38-A41); the remaining relevant RLA provisions are reproduced in the Appendix to this Brief in Opposition (Opp. App. A1).

STATEMENT OF THE CASE

Because the petition ignores the narrow procedural posture of this case and rests on Transamerica's version of the untried facts underlying this dispute, we begin with a fuller description of both the proceedings below and ALPA's complaint as construed by the court of appeals. Transamerica, a wholly-owned subsidiary of the Transamerica Corporation ("TAC"), operated as a charter airline providing passenger and cargo transportation services in interstate and foreign commerce. ALPA is the exclusive collective bargaining representative under the RLA for the airline pilots employed by Transamerica. In March of 1984, ALPA and Transamerica entered into collective bargaining negotiations over the terms of a new labor contract. The parties invoked the mediation services of the NMB in July of 1984 and continued in mediation until Transamerica terminated flight operations in September of 1986.

Fairly construed, ALPA's complaint alleges that Transamerica committed two distinct RLA violations during this collective bargaining period. First, the complaint asserts that "Transamerica has entered into collective bargaining negotiations with ALPA, ostensibly to conclude a new collective bargaining agreement, but in those negotiations it has failed and refused to exert reasonable efforts to reach agreement with ALPA or to otherwise bargain in good faith

with ALPA." (Pet. App. A7). ALPA claims that, by engaging in negotiations with no intent to reach agreement, Transamerica has violated its duty under Section 2, First of the RLA to "exert every reasonable effort to make and maintain agreements." 45 U.S.C. § 152, First.

Second, the complaint alleges that Transamerica acted with its corporate parent TAC to create and operate a nonunion airline subsidiary—Trans International Airlines ("TIA")—in Transamerica's actual and historic marketplace as a device to achieve its bargaining demands. Although Transamerica now seeks refuge in ALPA's asserted failure to list some specific transfer of work from Transamerica to TIA (*e.g.*, Pet. 3, 6-7, 9, 11, 15), the court of appeals easily construed the complaint to allege that Transamerica purposefully created and operated TIA to divert work actually and historically performed by Transamerica's pilots to its nonunion replacement subsidiary. (Pet. App. A10-A13). So, too, the limited record evidence before the courts below indicates that Transamerica created TIA to obtain the lower labor costs that Transamerica had failed to achieve through collective bargaining (R. 138-39, 158) and that Transamerica specifically designed and operated TIA to obtain the freight delivery contracts actually and traditionally flown by Transamerica (R. 134-139, 145).

The complaint alleges that such conduct violates the recognitional and noninterference obligations established in Sections 2, Third and 2, Fourth of the RLA, 45 U.S.C. §§ 152, Third, 152, Fourth, by subverting ALPA's status as the collective bargaining representative of Transamerica's pilots. As the court of appeals explained, the complaint also states a claim that Transamerica violated the RLA's status quo requirements, *see id.* §§ 152, First, 156, by unilaterally altering the actual, objective working

conditions of *Transamerica's* pilots through the creation and operation of TIA during contract negotiations. (Pet. App. A11-A12). The complaint seeks an order directing Transamerica to bargain in good faith with ALPA, to restore the status quo working conditions at Transamerica prior to the creation and operation of TIA, and to award Transamerica's pilots back pay for the losses they incurred through Transamerica's operation of TIA.

On Transamerica's motion, the district court dismissed the entire complaint for lack of subject matter jurisdiction. In a terse oral opinion, the district court simply held that federal courts lack jurisdiction "to allow a case to go forward challenging a lack of good faith [bargaining] until the bargaining is over." (Pet. App. A20). In a subsequent written opinion, the district court accepted Transamerica's argument that its operation of TIA created an RLA "representation dispute" and thereby precluded ALPA from protecting the organizational rights and working conditions of *Transamerica's* pilots under the RLA's recognitional and status quo provisions. (Pet. App. A30-A31).

The court of appeals reversed in a unanimous decision. Following this Court's opinion in *Chicago & N.W. Ry.* v. *United Transp. Union*, 402 U.S. 570 (1971) ("*Chicago & North Western*"), the court of appeals held that Congress specifically intended federal courts rather than the NMB to enforce the bargaining requirements of Section 2, First and that nothing in the RLA or its legislative history divests federal courts of such jurisdiction while the parties engage in mediation with the assistance of the NMB. (Pet. App. A5-A7). The court then rejected Transamerica's attempt to characterize ALPA's replacement subsidiary allegations as a nonjusticiable "representation dispute" concerning the proper bargaining representative for *TIA* pilots. The court held that the complaint properly challenges *Transamerica's*

treatment of its own pilots (as represented by ALPA) through its creation and operation of TIA during the RLA's status quo period. (Pet. App. A9-A10). In doing so, the court of appeals carefully distinguished this case from the Second Circuit's decision in *Air Line Pilots Ass'n, Int'l* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981), which did not involve a replacement subsidiary created to obtain work actually or traditionally performed by the carrier and which explicitly recognized federal jurisdiction to enforce the RLA's status quo and recognitional obligations against the type of carrier conduct challenged in this case. (Pet. App. A9-A11).[1]

ARGUMENT

In its petition for review by this Court, Transamerica has abandoned its earlier position that ALPA's complaint fails to state claims for relief under the RLA's bargaining, recognitional or status quo provisions. (*E.g.*, Pet App. A7-A8, A11-14). Instead, Transamerica seeks to insulate its conduct from judicial scrutiny on the theory the RLA implicitly deprives federal courts of subject matter jurisdiction to consider ALPA's claims. In this procedural posture, the allegations of the complaint must be construed in the light most favorable to ALPA, and all ambiguity must be resolved in favor of factual assertions that support federal jurisdiction. *See, e.g., Scheuer* v. *Rhodes*, 416 U.S. 232,

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[1] Although Transamerica terminated its flight operations in September of 1986 (Pet. App. A3), the parties continue to engage in bargaining over the effects of Transamerica's shutdown, *see First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 677 n.15 (1981). The court of appeals held (Pet. App. A3 & n.1) that Transamerica's shutdown does not render this case moot because ALPA seeks damages under its TIA claims, because the parties continue to engage in collective bargaining, and because the underlying labor dispute is "capable of repetition yet evading review." *See Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

236 (1974). As we show below, however, Transamerica's quarrel with the court of appeals lies not so much with its construction of the RLA but with its construction of ALPA's complaint. Without the ability to mischaracterize the underlying facts in this dispute, Transamerica lacks any plausible claim that the decision below misconstrues the RLA or creates an intercircuit conflict concerning the RLA disputes committed to the exclusive jurisdiction of NMB.

I. THE DECISION BELOW CREATES NO CONFLICT AMONG THE CIRCUITS OVER THE NATURE OF THE RLA REPRESENTATION DISPUTES COMMITTED TO THE NMB'S EXCLUSIVE JURISDICTION.

In an effort to establish a basis for review by the Court at this early stage in the proceedings, Transamerica maintains that the decision below directly conflicts with the Second Circuit's holding in *Texas International* (Pet 8-12) and conflicts "in principle" with every representation dispute case ever decided under the RLA (Pet. 8, 14-16). As the court of appeals carefully explained, Transamerica is mistaken.

1. Transamerica does not (and cannot) deny that federal courts enjoy subject matter jurisdiction to enforce the provisions in Sections 2, Third and 2, Fourth of the RLA, 45 U.S.C. §§ 152, Third, 152, Fourth, which prohibit carrier conduct that interferes with the union's ability to function as an effective collective bargaining representative. *See International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 759-60 (1961). In fact, this Court has upheld judicial enforcement of these central RLA provisions both before and after Congress amended the RLA in 1934 to create the NMB as the administrative agency responsible for resolving representation disputes under the RLA. *See Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 542-45 (1937);

Texas & N.O. Ry. v. *Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548, 567-69 (1930). The courts of appeals, in turn, have construed Sections 2, Third and 2, Fourth to prohibit carriers from transfering work or work opportunities away from the bargaining unit with the intent and effect of undermining the union. *See, e.g., Ruby* v. *TACA Int'l Airlines, S.A.,* 439 F.2d 1359, 1363-64 (5th Cir. 1971).

In addition, federal courts maintain exclusive jurisdiction to enforce the status quo requirements established in Sections 2, First and 6 of the RLA, 45 U.S.C. §§ 152, First, 156, during collective bargaining negotiations. *See Detroit & T.S.L. R.R.* v. *United Transp. Union,* 396 U.S. 142, 150-53 (1969) ("*Shore Line*"). These provisions require both parties to maintain "actual, objective working conditions," *id.* at 153, while they exhaust the RLA's elaborate collective bargaining procedures. *See* 45 U.S.C. §§ 155, First, 156; *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes,* 107 S. Ct. 1841, 1851 (1987). In particular, the RLA's status quo provisions prohibit carriers from diverting work or work opportunities away from bargaining unit members—and thereby achieving bargaining demands through self-help—during the RLA's negotiation period. *See, e.g., Southern Ry.* v. *Brotherhood of Locomotive Enginemen and Firemen,* 337 F.2d 127, 131-32 (D.C. Cir. 1964); *Local 553, Transp. Workers Union* v. *Eastern Air Lines, Inc.,* 544 F. Supp. 1315, 1327 (E.D.N.Y.), *aff'd as mod.,* 695 F.2d 668 (2d Cir. 1982).

The court of appeals found (Pet. App. A11-A14)—and Transamerica does not dispute—that ALPA's complaint squarely states claims for relief under these RLA provisions by alleging that Transamerica created and operated TIA for the purpose of obtaining work actually and historically

flown by Transamerica pilots represented by ALPA. Transamerica cannot escape judicial scrutiny of these claims simply by asserting that ALPA's complaint "only makes sense" (Pet. 7) as a nonjusticiable dispute under Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth, over the appropriate collective bargaining representative for TIA pilots.[2] ALPA's complaint simply does not seek judicial relief requiring Transamerica or TIA to recognize ALPA as the collective bargaining representative of *TIA* pilots. Nor does ALPA seek to bargain over the employment terms of TIA pilots or to extend ALPA's collective bargaining agreement with Transamerica to cover those pilots. Instead, the complaint quite plainly alleges that *Transamerica* has violated *its* RLA obligations to ALPA (and the *Transamerica* pilots ALPA represents) by creating a nonunion, replacement carrier to obtain work traditionally and actually performed by Transamerica's pilots. As the court below explained (Pet. App. A-11-A12), ALPA only seeks judicial intervention under the RLA directing *Transamerica* to restore the status quo working conditions of *Transameria's* pilots.

Nothing in the RLA or its legislative history indicates that Congress intended the NMB's role in the representation disputes to immunize such carrier treatment of its own employees from judicial scrutiny. Indeed, because the NMB cannot order any of the relief ALPA seeks in this case, *see*

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[2] Section 2, Ninth of the RLA directs the NMB to resolve disputes over "whether one organization or another was the proper representative of a particular group of employees." *Switchmen's Union of North Am.* v. *National Mediation Board*, 320 U.S. 297, 302 (1943). This Court has inferred from Section 2, Ninth a congressional intent to preclude federal courts from resolving such disputes. *See General Comm. of Adjustment* v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 334-37 (1943).

Shore Line, 396 U.S. at 158,[3] Transamerica's "representation dispute" defense would effectively permit a carrier to avoid the RLA's status quo and recognitional obligations by transferring some or all of its operations to a formally separate corporate entity. This Court has consistently rejected similar attempts to deprive unions of a "remedy to enforce the statutory commands which Congress ha[s] written into the Railway Labor Act" by constricting federal subject matter jurisdiction. *Switchmen's Union*, 320 U.S. at 300; *see, e.g., Virginian Railway*, 300 U.S. at 545-49; *Texas & New Orleans*, 281 U.S. at 567-69. Transamerica provides no reason to depart from this salutary construction of the RLA.

2. For similar reasons, the Second Circuit's decision in *Texas International* fully supports federal jurisdiction over ALPA's complaint in this dispute. In *Texas International*, the relevant carrier, which flew scheduled service in the southwestern United States, created a holding company which, in turn, created a second airline subsidiary to fly completely unrelated passenger service in the northeast corridor. As the bargaining representative for Texas International pilots, ALPA initiated an RLA action to enforce its collective bargaining agreement with Texas International against the newly-created carrier. *See Texas International,*

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[3] Contrary to Transamerica's misleading description of the NMB's role in genuine representation disputes (Pet. 12-14), the NMB lacks statutory authority to issue an order directing Transamerica to reconstruct the status quo working conditions existing prior to its operation of TIA. *See Shore Line*, 396 U.S. at 158. Accordingly, ALPA's petition before the NMB—which *does* seek ALPA representation of the TIA pilot group—does not divest the court of jurisdiction to consider ALPA's distinct claims under Sections 2, Fourth and 6 of the RLA. *Cf. Railway Labor Executives Ass'n* v. *Boston & Maine Corp.*, 808 F.2d 150, 156-58 (1st Cir. 1986) (exclusive jurisdiction of arbitrators over RLA minor disputes does not preclude independent judicial enforcement of Section 2, Fourth), *cert. denied*, 56 U.S.L.W. 3245 (U.S. Oct. 6, 1987).

656 F.2d at 19. Acknowledging that the case presented a "close" question, the Second Circuit held that ALPA's complaint raised a "murky" representation dispute because ALPA sought to govern the ongoing working conditions of the pilots employed by the second carrier. *See id.* at 19-24. Yet the Second Circuit deliberately and explicitly limited its holding to a case involving "separate corporations serving different areas and flying over different routes." *Id.* at 18. The Second Circuit likewise confirmed that federal courts retain jurisdiction to enforce Section 2, Fourth against carrier attempts to "transfer existing business flown by ALPA pilots to a newly formed corporate alter ego for the purpose of displacing the work of ALPA pilots." *Id.* at 19 (citing *Ruby*, 439 F.2d at 1359).

As the court of appeals explained in some detail (Pet. App. A9-A11), ALPA's complaint in this case challenges precisely the carrier conduct which creates federal jurisdiction under the Second Circuit's *Texas International* opinion.

> In the instant case, the complaint alleges that Transamerica, along with its corporate parent, acted "to devise a second airline subsidiary for [the corporate parent] to operate in Transamerica's marketplace." Consequently, the instant case is closer to the first category noted in *Texas International*, where the carrier seeks to "transfer existing business flown by ALPA pilots to a newly formed corporate alter ego for the purpose of displacing the work of ALPA pilots," *id.*, and, therefore, is an interference with representation and organization within the purview of 45 U.S.C. § 152 Third and Fourth.

(Pet. App. A10). Transamerica cannot now avoid the court of appeals' actual treatment of *Texas International* by protesting that ALPA failed to allege some specific transfer of work from Transamerica to TIA. (Pet. 11-12).

Given the court's construction of ALPA's complaint to assert the equivalent of such conduct, the decision below simply does not create any conflict with *Texas International.*

3. Finally, Transamerica's reliance (Pet. 8, 14-16) on airline or railroad merger cases and Justice O'Connor's in chambers opinion in *Western Airlines, Inc.* v. *International Bhd. of Teamsters,* 107 S. Ct. 1515 (1987), is entirely misplaced. In the RLA merger cases cited by Transamerica (Pet. 8), the union sought judicial enforcement of its collective bargaining agreement after the signatory carrier had merged with a second carrier which employed a greater number of employees in the relevant craft or class. In that unique context, courts have reasoned that judicial "[e]nforcement of the contract . . . inescapably entail[s] the continuance of the Union's role as employee representative for the minority group" of employees after the merger. *International Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.,* 717 F.2d 157, 161 (5th Cir. 1983). ALPA's replacement subsidiary claim in this case, by contrast, does not implicate a "minority" union's post-merger representational status at a newly-created carrier. Instead, ALPA challenges Transamerica's treatment of *its own pilots* under the RLA in this case, *see supra* pp. 9-10, and thus does not seek judicial relief that "inescapably entails" judicial enforcement of ALPA's status as the collective bargaining representative for anyone other than Transamerica's pilots.

For this reason as well, the decision below does not conflict with Justice O'Connor's opinion granting a stay in *Western Airlines.* Justice O'Connor quite plainly limited her provisional assessment of representation issues under the RLA to "disputes as to the effect of collective bargaining agreements on representation in airline *merger* situation[s]." *Western Airlines,* 107 S. Ct. at 1517 (emphasis

added). Even assuming that Justice O'Connor correctly applied the RLA merger cases to the pre-merger successorship issue raised in *Western Airlines,* those cases do not govern the present dispute between Transamerica and the Transamerica pilots represented by ALPA. In any event, the Court has declined to grant plenary review in the *Western Airlines* litigation, *see Delta Airlines, Inc.* v. *International Bhd. of Teamsters,* 56 U.S.L.W. 3241 (U.S. Oct. 6, 1987) (remanding for consideration of mootness issues); as a result, Transamerica cannot bootstrap this case onto the Court's consideration of *Western Airlines* merely because both involve carrier contentions concerning the scope of nonjusticiable representation disputes under the RLA.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THIS COURT'S SETTLED CONSTRUCTION OF THE DUTY TO BARGAIN IN GOOD FAITH UNDER SECTION 2, FIRST OF THE RLA.

Transamerica apparently offers three reasons for concluding that federal courts lack subject matter jurisdiction over ALPA's claim under Section 2, First of the RLA: (1) that federal jurisdiction over bad faith bargaining claims during mediation is inconsistent with the RLA's collective bargaining scheme (Pet. 16-22), (2) that federal jurisdiction under Section 2, First only extends to cases involving a carrier's complete refusal to meet with its union (Pet. 19-20, 22-23), and (3) that bad faith bargaining claims under Section 2, First impermissibly require courts to regulate the substance of collective bargaining proposals (Pet. 24-26). This Court has already considered and rejected each of these contentions.

1. The RLA establishes a virtually endless process of "negotiation, mediation, voluntary arbitration, and conciliation" to encourage the voluntary adoption or modification

of labor agreements in the railway and airline industries. *Shore Line,* 396 U.S. at 148-49; *see Burlington Northern,* 107 S. Ct. at 1850-51 & n.10.[4] The "heart" of this "major dispute" collective bargaining process is the obligation imposed by Section 2, First

> to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, First. *See Chicago & North Western,* 402 U.S. at 574; *Jacksonville Terminal,* 394 U.S. at 377.

In *Chicago & North Western,* the Court confirmed that Section 2, First imposes a mandatory legal obligation to bargain in good faith during the RLA's major dispute negotiation process and that Congress intended the federal courts rather than the NMB to enforce that obligation through injunctive relief. *See Chicago & North Western,* 402 U.S. at 574-80; *see also Burlington Northern,* 107 S. Ct. at 1853-54 & n.15; *Virginian Railway,* 300 U.S. at 544-48. Although Section 2, First "is central to the effective working of the Railway Labor Act," *Chicago & North*

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[4] A party seeking to change rates of pay, rules or working conditions under the RLA, must tender advance written notice under Section 6 of the Act, 45 U.S.C. § 156. The parties must then negotiate over the proposed changes, *id.* § 152, Second, and if conferences fail to resolve the dispute, either party may invoke the NMB's mediation services, *id.* § 155, First. If mediation fails, the NMB proffers binding arbitration to the parties, which can occur only if both consent. *Id.* §§ 155, First, 157. An unsuccessful proffer of arbitration releases the parties from mediation and triggers the Act's 30-day "cooling off" period, *id.* § 155, First, after which either party can engage in economic self-help. *See Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 377-78 (1969).

Western, 402 U.S. at 578, Transamerica maintains that Congress implicitly intended to divest federal courts of jurisdiction to enforce Section 2, First while the parties engage in the mediation phase of RLA collective bargaining. Instead, under Transamerica's interpretation of the RLA, "[t]he NMB enforces the duty to bargain in good faith by holding a recalcitrant party in mediation (and thus preventing it from engaging in self-help in support of its position) until the NMB's mediator is satisfied that such party has made every reasonable effort to reach agreement." (Pet. 18-19).

The Court emphatically rejected this very construction of Section 2, First in *Chicago & North Western*:

> [W]e must consider the Court of Appeals' position that the question whether a party had exerted every reasonable effort was committed by the Railway Labor Act to the National Mediation Board rather than to the courts. We believe that the legislative history of the Railway Labor Act rather plainly disproves this contention. . . . Throughout the hearings on the bill which became the 1926 Act there are repeated expressions of concern that the National Mediation Board should retain no adjudicatory function, so that it might maintain the confidence of both parties. . . . In light of these considerations, *we think the conclusion inescapable that Congress intended the enforcement of § 2 First to be overseen by appropriate judicial means rather than by the Mediation Board's retaining jurisdiction over the dispute or prematurely releasing the parties for resort to self-help if it feels such action called for.*

Chicago & North Western, 402 U.S. at 579-80 (emphasis added; footnotes omitted); *see also Shore Line*, 396 U.S.

at 158 (concluding that "the [NMB] has no adjudicatory authority with respect to major disputes").

Transamerica offers no reason to disturb this holding in the context of the present dispute. While *Chicago & North Western* arose after the NMB had released the parties from mediation, neither the language of Section 2, First nor its legislative history suggests that radically different considerations apply to bad faith bargaining claims during mediation. To the contrary, Section 2, First by its own terms requires good faith bargaining in "all [RLA] disputes" without suggesting any exception for RLA disputes subject to mediation. *See* 45 U.S.C. § 152, First. Congress thus understood that "the legal obligation [stated in Section 2, First] is imposed, and . . . the deliberate violation of that legal obligation [can] be prevented by court compulsion"—without regard to the point at which a carrier violates Section 2, First. Hearings on H.R. 7150 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 91 (1926) (statement of Donald Richberg).[5] This Court, too, has recognized that judicial enforcement of Section 2, First is "of the essence" precisely because "[t]he strictest compliance with the formal procedures of the Act [which include mediation] is meaningless if one party goes through the motions with 'a desire not to reach an agreement.' " *Chicago & North Western*, 402 U.S. at 578 (quoting *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953)).

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[5] As the Court has often noted, the 1926 RLA consisted of an agreement negotiated between representatives of railway labor and the carriers which Congress subsequently enacted into law. *See Chicago & North Western*, 402 U.S. at 576; *Shore Line*, 396 U.S. at 151 n.18. As the labor spokesperson for that agreement, Richberg's statements in the congressional hearings "are entitled to great weight in the construction of the Act." *Chicago & North Western*, 402 U.S. at 576.

Transamerica's unprecedented view of Section 2, First is also flatly inconsistent with the overall structure of the RLA. Congress deliberately intended "to make the exhaustion of the Act's remedies an almost interminable process," *Shore Line*, 396 U.S. at 149, in an attempt to encourage negotiated agreements and to prevent the disruption of the transportation industry. *See Brotherhood of Ry. & S.S. Clerks* v. *Florida E.C. R.R.*, 384 U.S. 238, 246 (1966); *Burlington Northern*, 107 S. Ct. at 1854. Notwithstanding this clear congressional design, Transamerica's interpretation of Section 2, First will encourage parties to seek a premature termination of major dispute collective bargaining. Where, as here, a carrier refuses to exert reasonable efforts to reach an agreement during negotiations, the union's only remedy under the RLA will be to seek a release from mediation that triggers the RLA's cooling-off period and the onset of self-help. Transamerica's construction of the RLA will thus operate to accelerate self-help and increase the likelihood of wasteful strikes in the transportation industry—precisely the results Congress sought to avoid by requiring the parties to bargain in good faith throughout a lengthy and ordered major dispute process. *See Chicago & North Western*, 402 U.S. at 581 & n.14; *Shore Line*, 396 U.S. at 148-53.[6]

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[6] As the court below explained (App. A6-A7 & n.2), moreover, Transamerica's parade of horribles concerning the prospect of civil discovery in Section 2, First lawsuits (Pet. 22-23) does not provide any basis for divesting federal courts of *subject matter jurisdiction* over bad faith bargaining claims during negotiations. Congress expressly intended the federal courts to resolve such claims, and discovery is a necessary incident of that federal jurisdiction. *Cf. Virginian Railway*, 300 U.S. at 549-50. In any event, district courts retain substantial authority and discretion to prevent any discovery abuses through appropriately-framed protective orders. *See* Fed. R.Civ.P. 26(c), 26(g).

2. Similarly, Transamerica cannot seriously maintain (Pet. 19-21) that the RLA does not permit judicial scrutiny of bad faith bargaining claims under Section 2, First once the parties meet and confer during mediation. This Court has long held that Section 2, First requires the parties not only to meet and confer but also "to make reasonable efforts to compose differences" during negotiations. *Virginian Railway*, 300 U.S. at 548. As the Court explained in *Chicago & North Western*:

> As one leading commentator has said, . . . "[i]t was not enough for the law to compel the parties to meet and treat without passing judgment upon the quality of the negotiations. The bargaining status of a union can be destroyed by going through the motions of negotiations almost as easily as by bluntly withholding recognition."

Chicago & North Western, 402 U.S. at 574-75 (quoting Cox, *The Duty of Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1412-13 (1958)); *see also Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 721-22 n.12 (1945); *cf. NLRB* v. *Katz*, 369 U.S. 736, 747 (1962) (applying these principles under Section 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5)).

As the court below concluded (Pet. App. A7-A8), ALPA's complaint squarely alleges that Transamerica has violated this standard of conduct by refusing "to exert reasonable efforts during the negotiation process to reach an agreement." *Trans Int'l Airlines, Inc.* v. *International Bhd. of Teamsters*, 650 F.2d 949, 962 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981). Transamerica's apparent denial of this allegation (Pet. 20-21) creates an issue for trial, not a basis for dismissing ALPA's complaint. *See Chicago & Northwestern*, 402 U.S. at 584.

3. Finally, the decision below will not in any sense impose particular bargaining terms on carriers or regulate the substance of the collective bargaining agreements reached in negotiations. (Pet. 24-26). The longstanding remedy for a Section 2, First violation is a bargaining order —an injunction directing the carrier to exert every reasonable effort to reach an agreement through negotiations with the union. *See, e.g., Virginian Railway,* 300 U.S. at 540. This Court has consistently recognized that such relief promotes successful labor negotiations without trenching on the substantive content of bargaining proposals or eventual agreements. *See Chicago & North Western,* 402 U.S. at 578-80; *NLRB* v. *Insurance Agents' Int'l Union,* 361 U.S. 477, 488 (1960). Federal courts have enforced an untold number of such good faith bargaining orders under both the RLA and the NLRA without imperiling the collective bargaining scheme established in the federal labor laws. Accordingly, federal jurisdiction to entertain bad faith bargaining claims under Section 2, First could not possibly undermine "the whole institution of collective bargaining in the railroad and airline industries" (Pet. 23) as Transamerica now claims.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RAILWAY LABOR ACT, 45 U.S.C. § 151 *ET SEQ.*

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting r es of pay, rules, and working conditions, and the time and place for the beginning of conference between the representative of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.